
THE VILLAGE OF BURR RIDGE,)	
An Illinois municipal corporation,)	
)	
Complainant,)	
)	
v.)	Docket No. 09-0320
)	
COMMONWEALTH EDISON)	
COMPANY, an Illinois corporation,)	
)	
Respondent.)	

**STAFF’S RESPONSE TO THE ADMINISTRATIVE LAW JUDGE’S
AUGUST 10, 2009 RULING**

NOW COMES the Staff of the Illinois Commerce Commission (“Staff”), through its undersigned counsel, and pursuant to the Administrative Law Judge’s (“ALJ”) Ruling of August 10, 2009 (“ALJ Ruling”) and 83 Ill. Admin. Code Part 200.800(a), respectfully submits the following Brief.

Facts

On July 9, 2009, the Village of Burr Ridge (the “Village” or “Burr Ridge”) filed a “Complaint For Declaratory Ruling” (“Complaint For Declaratory Ruling” or “Complaint”). The Complaint For Declaratory Ruling requests that the Commission prohibit ComEd from (1) “charging the costs outlined in its May 22, 2009 letter to residential ratepayers under the provisions of Rider LGC,” and (2) “charging any future costs incurred for meeting with residents, Village staff, and trimming supervision to residential ratepayers under the provisions of Rider LGC [.]” Complaint, p. 7. On July 13, 2009, Burr Ridge filed a Motion For Temporary Restraining Order and Preliminary Injunction (“Motion For Injunctive Relief” or “Motion”). The Burr Ridge Motion For Injunctive Relief requests that

the Commission enter a “Temporary Restraining Order and Preliminary Injunction enjoining ComEd from taking any actions to collect the costs contained in the May 22, 2009 letter from residential customers under the provisions of Rider LGC.” Motion, p. 5.

On August 10, 2009 the ALJ Ruling was issued directing that the parties brief the following issues:

- (1) Under what authority does the Illinois Commerce Commission have the power to issue a temporary restraining order?
- (2) Under what authority does the Illinois Commerce Commission have the power to issue a preliminary injunction?
- (3) Under what authority does the Illinois Commerce Commission have the power to construe proper costs under contract?
- (4) In the absence of the ComEd-Burr Ridge contract, would Rider LGC apply to the vegetation management activities involved in this docket? If not, identify the legal authority permitting ComEd to apply Rider LGC pursuant to a contract.

ALJ Ruling.

Argument

Introduction

First, Staff welcomes this opportunity to brief the issues that the ALJ identified in the ALJ Ruling. Before addressing the four distinct issues identified in the ALJ Ruling, Staff would note that whatever equitable authority the Commission may or may not have, it would not be appropriate to enjoin a utility from *billing* a customer pursuant to and consistent with a Commission approved tariff absent a determination that the tariffed rates are no longer just and reasonable. Staff will explain this position by first addressing issue numbers (1) and (2) together under the broad heading of the Commission’s authority to issue injunctive relief. Staff will then address issue numbers (3) and (4) together.

Commission's Authority To Issue Injunctive Relief

The Illinois Supreme court “has consistently held, that, inasmuch as an administrative agency is a creature of statute, any power or authority claimed by it must find its source within the provisions of the statute by which it is created. (*City of Chicago v. Fair Employment Practices Com.* (1976), 65 Ill. 2d 108, 113; *Chicago Division of the Horsemen's Benevolent & Protective Ass'n v. Illinois Racing Board*, Ill. 407, 410. (1972), 53 Ill. 2d 16; *Pearce Hospital Foundation v. Illinois Public Aid Com.* (1958), 15 Ill. 2d 301, 307; *Hesseltine v. State Athletic Com.* (1955), 6 Ill. 2d 129, 131-32; *People ex rel. Polen v. Hoehler* (1950), 405 Ill. 322, 326-28; *People ex rel. Hurley v. Graber* (1950), 405 Ill. 331, 340-44, 346-48.)” *Bio-Medical Laboratories, Inc. v. Trainor*, 68 Ill. 2d 540, 551 (1977) Unlike a court, the Commission has no general or common law powers and it must find statutory authority for the powers it exercises. *Business and Professional People for the Public Interest v. Illinois Commerce Comm'n*, 136 Ill. 2d 192, 201, 243 (1990).

The Commission's authority, however, is not limited to only those powers that are expressly and specifically enumerated in the Act. Illinois courts have also long held that an express statutory grant of authority to an administrative agency also includes the authority to do what is “reasonably necessary” to accomplish the legislature's objective. *Lake Co. Board of Revenue v. Property Tax Appeal Bd.*, 119 Ill. 2d 419, 427 (1998); *Abbott Labs v. Illinois Commerce Comm'n*, 289 Ill. App. 3d 705, 712 (1997). Further, reasonable discretion is afforded administrative agencies so they can “accomplish in detail what is legislatively authorized in general terms.” *Lake Co. Bd. Of Revenue*, 119 Ill. 2d at 428. Moreover, the Illinois Supreme Court has long held that “[a] statute which is being administered may not be altered or added to by the exercise of a power to

make regulations thereunder. *Ruby Chevrolet, Inc. v. Dept. of Revenue*, 6 Ill. 2d 147 (1955), *citing to Illinois Bell Tel. Co. v. Commerce Comm’n*, 414 Ill. 275 (1953).

Burr Ridge contends that Section 200.190 of the Commission’s rules grant the Commission the authority to enter the injunctive relief Burr Ridge seeks. Motion For Injunctive Relief, p. 4. Burr Ridge, however, misreads or overstates the language of Section 200.190. The only subsection of Section 200.190 that Burr Ridge could rely on is subsection (d). Subsection (d) provides in full that “Relief pending disposition of a proceeding, including interim relief, may be requested by motion.” 83 Ill. Admin. Code Section 200.190(d). Staff disagrees with Burr Ridge’s statement that Section 200.190 provides the Commission authority to grant “interim relief such as a temporary restraining order and/or preliminary injunction.” Motion For Injunctive Relief, p. 4. Section 200.190 clearly provides the Commission with authority to grant relief that it has otherwise been authorized to grant by the Illinois General Assembly in the Public Utilities Act (“PUA”) on an interim basis. As noted above, however, an enabling statute “may not be altered or added to by the exercise of a power to make regulations thereunder. *Ruby Chevrolet, Inc. v. Dept. of Revenue*, 6 Ill. 2d 147 (1955), *citing to Illinois Bell Tel. Co. v. Commerce Comm’n*, 414 Ill. 275 (1953). Thus, the issue is whether a provision in the PUA provides the Commission with the authority to enter a temporary restraining order or a preliminary injunction. Burr Ridge has failed to identify such statutory provision, and Staff finds no such PUA provision.

Section 5/4-202 of the PUA provides the Commission with authority to seek injunctive relief in a county circuit court, but does not provide the Commission itself with authority to provide injunctive relief. 220 ILCS 5/4-202. Moreover, Section 5/13-515,

which is applicable only to telecommunications carriers, does provide express authority for the Commission to issue an order granting emergency relief without a hearing, but only to “protect the provision of competitive [telecommunications] service offerings to customers.” 220 ILCS 5/13-515(e). A number of sections of the PUA also provide the Commission with specific authorization to direct a utility to cease and desist from taking certain action. 220 ILCS 5/7-103, 220 ILCS 5/13-516(a)(1); 220 ILCS 5/13-902(g)(5); 220 ILCS 5/13-903(g)(3); 220 ILCS 5/16-115B(b)(1); 220 ILCS 5/19-120(c)(1). However, none of these sections are applicable to the situation presented in the instant case. Staff is aware of no other express grant of authority for the Commission to provide injunctive relief. Staff, consequently, questions whether the Commission has authority to issue the injunctive relief Burr Ridge seeks. See *e.g.*, *State Public Utilities Commission v. Okaw Valley Mutual Tel. Assoc.*, 282 Ill. 336 (1918)(Commission had no authority to restrain association from operating and maintaining a phone system but did have authority to entertain an application for certificate.).

The Commission is granted explicit authority to entertain complaints for “any act or things done or omitted to be done in violation, or claimed to be in violation, of any provision of this Act, or of any order or rule of the Commission” (220 ILCS 5/10-108). The PUA also explicitly provides that the complaining party need not incur direct damages to maintain such a complaint. (*Id.* (“No complaint shall be dismissed because of the absence of direct damage to the complainant.”)) As noted above, Illinois courts have also long held that an express statutory grant of authority to an administrative agency also includes the authority to do what is “reasonably necessary” to accomplish the legislature’s objective. *Lake Co. Board of Revenue v. Property Tax Appeal Bd.*, 119

Ill. 2d 419, 427 (1998); *Abbott Labs v. Illinois Commerce Comm'n*, 289 Ill. App. 3d 705, 712 (1997). Since damages are not required to hear complaints, then it would appear that the Commission must have the ability to order a utility to cease and desist from any violation found to exist. To the extent that such an order is injunctive in nature, the Commission would appear to have such authority. However, Section 10-108 also requires the Commission to issue a notice “fixing a time when and place where a hearing will be had upon such complaint.” (*Id.*) Thus, Section 10-108 requires a hearing and thus could not be used as authority for temporary injunctive relief. (See *Citizens Utilities Board*, Ill. C.C. Docket No. 08-0352, 2004 Ill. PUC LEXIS 408, 9 (note 1); 235 P.U.R.4th 385, (Order, July 21, 2004) (“Section 120 of the AGS Act does not allow this Commission to issue the temporary injunctive relief that CUB requested in its Amended Complaint, as the Act requires a hearing, with due notice of the charges, prior to issuance of a cease and desist order. (220 ILCS 5/19-120(c)).”))

However, even if the Commission were to conclude that it had the broad authority to grant the injunctive relief Burr Ridge seeks, the Commission could not grant such relief because Burr Ridge has failed to demonstrate any irreparable harm.

Irreparable Harm

Putting aside the distinctions between a temporary restraining order and a preliminary injunction, both a temporary restraining order and a preliminary injunction require a showing of irreparable harm. See *e.g.*, *Kable Printing Co. v. Mount Morris*

Bookbinders Union, Local 65-B, 63 Ill. 2d 514, 523-24 (1976).¹ Burr Ridge has failed to demonstrate irreparable harm. The Village's only attempt at making a showing of irreparable harm consists of a vague statement that "the Village and its residents will suffer irreparable harm if ComEd should begin charging residential customers" what it calls "inflated electric costs" during "difficult economic times." Motion For Injunctive Relief, p. 4. This attempt falls far short of what is required to demonstrate irreparable harm. See e.g., *The Washingtonian Home of Chicago v. City of Chicago*, 281 Ill. 110 (1917). If such charges are improper and not subject to collection under Rider LGC, the Commission can order reparations. The ability to obtain restitution or credit via reparations for any improper charges would appear to eliminate any claim of "irreparable harm."

Burr Ridge has presented no facts supporting irreparable harm. Instead, it merely alleges in conclusory fashion that should ComEd bill the Village and/or the residents the "supervisory" or "additional" amounts objected to that both the Village and residents would be irreparably harmed. However, "[i]njunctive relief is so extraordinary that allegations of mere opinion, conclusion, or belief are not sufficient." *Wilson v. Wilson*, 577 N.E.2d 1323, 1331 (1st Dist. 1991). Moreover, the amounts billed are clearly ascertainable and clearly quantifiable, as they will be itemized in a bill and then summed up. *Wilson*, 577 NE 2d at 1333; see also Complaint For Declaratory Ruling, Exhibit C for a billing example. Moreover, the Village does not allege that it will be irreparably harmed for *paying* such charges but merely for being *billed* such charges.

¹ This is true except where the injunctive relief sought is expressly provided by statute, which is not the case here. See Citizens Utility Board, ICC Docket No. 03-0592, 2004 Ill. PUC LEXIS 408 (July 21, 2004).

Staff, accordingly, recommends that even if the Commission were to conclude that it had the broad authority to grant the injunctive relief Burr Ridge seeks, the Commission should not grant such relief at this time because Burr Ridge has failed to demonstrate any irreparable harm.

**Whether The Commission Has The Authority
To Enter A Declaratory Ruling To Enforce The ComEd Rider**

Issues numbers (3) and (4) of the ALJ's Ruling both address the Commission's authority to reach and decide the merits of the case. They are:

- (3) Under what authority does the Illinois Commerce Commission have the power to construe proper costs under contract?
- (4) In the absence of the ComEd-Burr Ridge contract, would Rider LGC apply to the vegetation management activities involved in this docket? If not, identify the legal authority permitting ComEd to apply Rider LGC pursuant to a contract.

Because injunctive relief is an extraordinary remedy and only employed in emergency situations to preserve the status quo where otherwise irreparable harm would occur, Staff assumes that the last two issues require the parties to address the Burr Ridge Complaint For Declaratory Ruling. Before addressing the Burr Ridge Complaint For A Declaratory Ruling from a procedural perspective, Staff will address the ALJ's substantive question based upon the record as it exists today.

"An administrative agency, such as the Commerce Commission, is not a judicial body and it has no jurisdiction to adjudicate controverted individual property or contract rights. *People v. Peoria & P. U. Ry. Co.*, 273 Ill. 440, 113 N.E. 68." (*Mitchell v. Ill. Cent. R. Co.*, 317 Ill.App. 501, 509 (1943), *reversed on other grounds*, 384 Ill. 258 (1943)). Thus, the Commission does not have general authority to resolve disputes regarding the contract between ComEd and Burr Ridge.

The Commission's authority to construe the contract, if any, would only come through the Commission authority with respect to approved Rider LGC. Rider LGC, which essentially provides ComEd a means to recover certain additional costs incurred as a result of additional municipal requirements, states that ComEd may recover additional costs from customers located within the boundaries of a Local Government Unit:

In the event that a Local Government Unit enacts an ordinance or otherwise utilizes its constitutional or statutory powers to compel the Company, directly or indirectly, to perform [certain additional services or maintenance]:

See Complaint For A Declaratory Ruling, at 5; and Ex. B. To the extent that the contract reflects or embodies the additional requirements that Burr Ridge "compels" ComEd to perform pursuant to its "constitutional or statutory powers," then the contract is incorporated by reference into the tariff. The Commission, in Staff's view, is authorized to interpret the contract **for purposes of** enforcing and applying Rider LGC (assuming the contract evidences municipal requirements subject to collection under Rider LGC and is not simply a voluntary agreement by ComEd). It seems to Staff that this issue may require further evidentiary development, although the Contract does state that "this agreement constitutes a written agreement mandating specific vegetation management practices within the meaning of Section 8-505.1 (c) of the Illinois Public Utilities Act." (Complaint, Attachment A, ¶ 7)

The Village appears to raise the interesting question of whether both ComEd and the Village voluntarily agreed to use Rider LGC; or, whether ComEd was compelled, directly or indirectly, to incur additional incremental costs pursuant to Burr Ridge's

constitutional or statutory powers. The record, to date at least, refers to no ordinance or other municipal statutory authority that would *directly* compel ComEd to undertake additional services or maintenance activities invoking Rider LGC. ComEd, on the other hand, may be able to argue successfully that the parties' agreement to enter into the contract reflected Burr Ridge's decision to compel ComEd, directly or *indirectly*, to comply with certain additional requirements. In Staff's judgment, these issues reach the merits of the case and would require a full evidentiary record for Staff to provide the Commission with a recommendation and for the Commission to make a substantive determination in this proceeding.

Procedurally, however, the Commission must dismiss the Complaint for Declaratory Ruling because the Commission has no authority to make the declarations Burr Ridge seeks. The Complaint For A Declaratory Ruling essentially requests that the Commission find that the ComEd charge of additional supervision costs under the contract and Rider LGC is unlawful. In other words, the Village appears to challenge both the authority of ComEd to invoke Rider LGC and the "additional" costs that it has been billed and it is not seeking a ruling as to whether a specific statutory provision, rule or order is applicable to the Village.

As noted above, as an administrative state agency the Commission's authority is limited by its enabling statute, the PUA, and also by the Illinois Administrative Procedure Act. Administrative state agencies such as the Commission are authorized to issue declaratory rulings by Section 5-150 of the Illinois Administrative Procedure Act ("APA"), which provides that:

Each agency may in its discretion provide by rule for the filing and prompt disposition of petitions or requests for declaratory rulings *as to the*

applicability to the person presenting the petition or request of any statutory provision enforced by the agency or of any rule of the agency. Declaratory rulings shall not be appealable. The agency shall maintain as a public record in the agency's principal office and make available for public inspection and copying any such rulings. The agency shall delete trade secrets or other confidential information from the ruling before making it available.

5 ILCS 100/5-150(a)(emphasis added).

Also noted above, is the principle that statutory directives “may not be altered or added to by the exercise of a power to make regulations thereunder.” *Ruby Chevrolet, Inc. v. Dept. of Revenue*, 6 Ill. 2d 147 (1955), *citing to Illinois Bell Tel. Co. v. Commerce Comm’n*, 414 Ill. 275 (1953). The Commission has dutifully followed this mandatory directive from the General Assembly and promulgated a rule for the filing of petitions for declaratory ruling consistent with the APA directive. 83 Ill. Adm. Code 200.220. Section 200.220 of the Commission’s rules provides, in relevant part, that:

When requested by the affected person, the Commission may in its sole discretion issue a declaratory ruling with respect to: ... the applicability of any statutory provision enforced by the Commission or of any Commission rule to the person(s) requesting a declaratory ruling[.]

83 Ill. Adm. Code 200.220(a)(1).

Burr Ridge does not seek a declaration determining whether or not Rider LGC is applicable to it; in fact, it clearly assumes that Rider LGC is applicable to it. Its request for a declaratory ruling is for the Commission to declare that ComEd is prohibited from charging certain “supervisory” or “additional” costs to it under the Rider LGC. The relief Burr Ridge requests in the Complaint for Declaratory Ruling goes far beyond the directive of the General Assembly in the APA and accordingly goes far beyond the Commission’s own rule. The Burr Ridge Complaint For A Declaratory Ruling should be dismissed for seeking relief that the Commission is not authorized to grant. *See Illinois*

Indus. Energy Consumers Request for Declaratory Ruling, ICC Docket No. 98-0607, 1999 Ill. PUC LEXIS 202 (March 10, 1999); *Illinois Power Co. v. Town of Normal*, ICC Docket No. 98-0329, 1998 Ill PUC LEXIS 969 (Nov. 5, 1998). Staff, accordingly, recommends that the Commission dismiss the Complaint For A Declaratory Ruling without prejudice.

Conclusion

WHEREFORE, for the reasons set forth above, the Staff of the Illinois Commerce Commission respectfully recommends that the Commission dismiss Burr Ridge's Complaint For A Declaratory Ruling and its Motion for Injunctive Relief with out prejudice.

Respectfully submitted,

/s/ _____
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